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Western Australian Planning Commission

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DAP Parliamentary Public Hearing – 19 June 2015
Response by Chairman

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□ Do you believe the decision to change the quorum requirements reflects the following:..... 24

PRELIMINARY STATEMENT

In accordance with paragraph 4 of the *Parliamentary Witness Information Sheet,* I do have an opening statement, which may provide some context to this hearing and the questions it has asked.

Now it might assist the Committee if I point out, as I did in my written submission, my primary utility to the Committee concerning the DAP system. Importantly, it might assist if I briefly explain the sort of questions I can assist with, and others which I may be of less benefit, especially given the short time afforded me since receiving notice that I would be attending this hearing.

Following that, it might also assist the Committee if I say a few comments about the WA planning framework generally, which I am best able to comment on as Chairman of the Western Australian Planning Commission. That might provide some context to the sort of planning challenges the State now faces, and goes some way to explaining the purpose and intent for which the DAP system was introduced.

Comments on question relating to the review and amendments of the DAP system

With that in mind, I note some of the questions raised do go to the recent review and amendments of the DAP system. I am generally aware of that review and DAP amendments. However, the Committee should appreciate the DAP system is independent of the Commission. The Commission does have broad powers under the Planning and Development Act to advise the Minister on the planning system generally, which does include the DAP system. As a Chairman of the Commission who was also previously a Director General, I am in a somewhat unique position to give practical advice to both the Minister and the new Director General.

These are roles I take very seriously. Nonetheless, the ultimate decision for the final design of the DAP legislative amendments was really a matter for the Minister, who acted principally on the advice of officers of the Department, who were the ones were engaged in the public consultation over these changes.

I also have a very good and constructive relationship with the current Director General of the Department of Planning, who is also a member of the Commission. Therefore, my preference would be to refrain from giving too many speculative answers that might be perceived as "stepping on her patch". Nonetheless, I will provide answers to the best of my ability, provided this Committee realises in many circumstances the question might be better addressed by the Department.

Comments on questions relating to the introduction of DAP system generally

Moreover, in relation to the Committee's questions relating to the introduction of the DAP system generally, I can offer some comments as the previous Director General of the Department. However, the Committee should appreciate that the DAP system was introduced several years ago in 2011. The Bill that created the heads of power in the Planning and Development Act was approved by Parliament in 2010. The preliminary work undertaken to investigate whether to introduce the DAP system began several years before that still, in the time of the Hon Minister Alannah MacTiernan, at least in 2009 if not before.

As such, I note several of the questions ask for specific examples of certain things relating to the introduction of the DAP system. I do recall the Department carrying out certain investigations, case studies, discussion papers and public workshops. I am sure you can also appreciate several high level stakeholder conversations, including

with Ministerial figures. Therefore, I would therefore apologise in advance for having difficulty in providing, now so many years later, exacting examples in the type the Committee now asks.

In some instances it may be of greater utility to ask the Department if they have any such records on file. Otherwise, I can only give answers to the best of my own recollection, of events and examples of many years' past.

Planning challenges

With the above in mind, the Committee might benefit with some general comments about the current planning challenges underpinning the background to the introduction of the DAP system. Now as Committee members will no doubt be very aware of, the Commission and Department recently released the paper draft *Perth and Peel @ 3.5 million* strategic plan. It would be fair to say this is a document of much significance, probably equal in importance to the Stephenson and Hepburn plan of 1955. You will all be aware of the media interest now about high density and how the issue has, for good measure, because a major topic of discussion in the public domain.

Now a key planning challenge outlined in the *Perth and Peel @ 3.5 million* document is how the population of the Perth and Peel metropolitan area is likely to nearly double to 3.5 million people by 2050. However, this is not a new problem. It is also fair to say that governments of both major parties have long recognised these challenges for some time. It was Hon Planning Minister Alannah MacTiernan who first introduced the *Network City Strategy* in 2004. It was Hon Planning Minister John Day added to that work, following up with *Directions 2031* in 2010, and now releasing *Perth and Peel @ 3.5 million.*

We will need to make some very difficult and challenging decisions if we are going to address the issues that come with such population growth. In particular, the Perth metropolitan area's significant urban sprawl has also long be recognised as something that needs addressing. For example, *Directions 2031* introduced a new infill target for residential development of 47 per cent. Unfortunately, five years on, current infill rates are still only 28 per cent.

We therefore need to improve things at that localised level, and as Chairman of the Commission responsible for planning for the whole metropolitan area, if not also the whole State, I take that challenge very seriously. I am publicly quoted on the record at expressing my concern for the way necessary planning measures are being inhibited by the well-known planning barrier "NIMBYism" – for 'not in my backyard'.

Introduction of the DAP system

It was within this longstanding background that the DAP system was introduced. Again, it should be kept in mind that DAPs were a bipartisan idea in this State, first investigated by Minister MacTiernan and followed up and implemented by Minister Day.

I also observe there have recently been some comments by certain Federal political figures about the introduction of DAPs in this State. However, we should recall it was also a whole-of-Australia-governments measure too, as part of the Commonwealth's Development Assessment Forum.

Therefore, we should be careful of not only reviewing this matter in hindsight without regard to the original context of its introduction. DAPs are one measure Government has introduced to address some of the planning challenges I have briefly outlined.

The issue is in my experience not simply about existing planning laws, although I note the Minister, as advised by the Commission and Department, about to release a significant 'once in a generation' reform in the way of the new Local Planning Scheme regulations.

Instead, the issue is often about the proper utilisation of discretion within the existing planning framework. The issue is in many accounts, and with all respect to local government colleagues, about the failure of Councils to approve developments where Council itself has created a planning system to allow for that very thing. As a result, we continue to see those failures in the infill targets.

We continue to see the widespread opposition to a number of development applications, in circumstances now being explored in a very detailed and interesting way by certain sections of the media. For example, I note and agree with the recent sentiments of Gareth Parker in the *West Australian*, dated 4 June 2015, when he observed:

'This is the evolution of what's generally been referred to as NIMBYism, or the not-in-my-backyard phenomenon. Whereas it used to be flat-out opposition to density in the suburbs, it has now taken on a subtler character, with the objectors acknowledging the need for density and affordable or public housing, but asserting its "inappropriateness" for the location proposed.'

Evaluation of DAPs

Finally, as to my overall assessment of DAPs, I acknowledge they are unlikely to be perfect. No decision-maker can be perfect, especially if the decision involves an element of discretion. However, the greater issue for me is whether that discretion will be exercised in an appropriate, quasi-judicial manner according to all relevant planning considerations required at law.

As I explained in some detail in my previous written submission, residents' opinions are relevant considerations in town planning matters. However, the views of residents need to be viewed within the context of the relevant town planning scheme. Planning decisions must be defended on their proper planning merits.

Now it is my personal view, and to some extent it is largely based on my decades of experience in both local government and Commission decision-making, that DAPs are the most appropriate vehicle for the State to address those planning challenges. I believe DAPs have the right mix, where technical expertise prevails, and where local politics is relevant but not the dominant factor in a decision.

DETAILED RESPONSES TO QUESTIONS

1. Please give your view on the operation and effectiveness of the Planning and Development (Development Assessment Panels) Regulations 2011 generally, using the criteria of transparency, certainty, timeliness and efficiency. Please include in your answer any observations on the operation of DAPs that have made decisions on applications for which the WAPC prepared the responsible authority report.

In terms of the introduction of the DAP system originally, in the context of being my previous role as Director General of the Department of Planning, the Department undertook several case studies looking at these measures in current local government decision-making. I also recall there were also several discussion papers, information workshops and other consultation engaged. However, as that was now several years ago, the Department would be better placed to provide the exact examples.

Moreover, in terms of these criteria as measured more recently by the Department in its own investigation of the ongoing of the DAP system in 2012-2013, I understand the results were set out in the *'Review of Development Assessment Panels'*, September 2013. I am informed the results were as follows:

Survey Question	Survey Group	% Favourable	% Neutral	% Unfavourable
DAPs has improved the transparency of decision making	Presiding Members	89	11	0
	Panel Members	33	41	26
	Industry	100	0	0
	Local Government	13	47	40
	Overall	42	35	24
DAPs has improved the consistency and reliability of decision making	Presiding Members	78	22	0
	Panel Members	33	37	30
	Industry	100	0	0
	Local Government	20	47	33
	Overall	42	35	24
DAPs has improved the quality of decision making	Presiding Members	78	22	0
	Panel Members	44	41	15
	Industry	75	25	0
	Local Government	7	47	47
	Overall	42	38	20
DAPs has improved the efficiency and timeliness of decision making	Presiding Members	22	55	22
	Panel Members	11	37	52
	Industry	100	0	0
	Local Government	7	40	53
	Overall	18	38	44
DAPs has improved the quality of the planning conditions	Presiding Members	67	11	22

	Panel Members	41	26	33
	Industry	75	25	0
	Local Government	0	47	53
	Overall	36	29	34

I believe WALGA also conducted its own survey, however, I understand it only asked local government staff and Councillors what their views are. The Department, by contrast, asked not just local government but other DAP members and industry for its views. However, a question about these findings would perhaps be better directed to the Department.

2. Do you believe the current passage reflects the type of development applications DAPs are determining?

In cases of major projects that are likely to face significant approval delays and may be highly contentious, and in cases where major projects are proposed but there is limited local government technical capacity to undertake an appropriate level of assessment, Development Assessment Panels are being considered, as have been established in other States. Development Assessment Panels would include elected representatives as well as independent experts.

Yes. As I am not otherwise involved in day-to-day DAP applications, as I am not a member of a DAP panel, the Department would be better placed to give specific examples. However, I do believe, on what I know and hear, that DAPs have and do addressed development applications that are highly contentious, major projects, and technically complex.

The best practical illustration of this is the general proponent satisfaction with the system, and the increase of the number of "opt-in" being made to DAPs. In other words, people are 'voting with their feet'. The increased bandwidths for opt-in applications (from $7-$10 million upwards and $3-$2 million downwards) will only continue to emphasis this.

3. If not, what accounts for the change in focus from what applications DAPs were originally envisaged to deal with?

<u>Questions on submission</u>

4. You state on page 1 of your submission:

Development Assessment Panels are seen as a means to resolve issues which have been raised for some time by members of the public including the development industry, due to the inability of Local Government to deal effectively and efficiently with development applications which may be controversial in nature or at times unacceptable for various reasons by interested parties.

□ Do you believe there were systemic issues with the performance of local government in decision-making on planning applications prior to the introduction of DAPs which necessitated their introduction, rather than selective steps to deal with issues with particular local governments? If so, please cite examples in your answer of the lack of effectiveness and efficiencies of local governments you refer to.

Yes, there were systematic issues raised with the performance of local government decision-making on planning applications prior to the introduction of DAPs.

As previously explained, I recall, in the context of being the previous Director General of the Department of Planning, that the Department undertook several case studies. I recall there were also several discussion papers, information workshops and other consultation engaged. However, as that was now several years ago, the Department would be better placed to provide the exact examples.

5. In the last sentence in paragraph 2 on page 2 of your submission you state:

All members have a duty to understand their roles and responsibilities and unfortunately, in my view, a number of Councillors and hence Councils do not understand their quasi-judicial role in terms of exercising development approval functions through the provisions of the Local Government Planning Scheme.

□ Do you believe this is a systemic issue that has been a factor in the introduction of DAPs?

Yes.

□ When you say "a number of Councillors and hence councils", how many local governments, in your view, suffered from this drawback out of the total of 140 local governments?

It is difficult for me to give an exact figure, especially given the limited time afforded me for the preparation of this hearing. I largely draw this conclusion from my decades of day-to-day experience with local government and the Commission, dealing with thousands of different applications.

□ Wouldn't training received by Councillors assist in resolving this issue? Are there any shortcomings in the current training?

Yes. One key critical by-product of the DAP system was the introduction of mandatory training in the basics of planning law and decision-making. The Department engaged a well-known and respected planning lawyer (Belinda Moharich), who prepared a training manual *Making Good Planning Decisions*. She in turn developed a training package that has form the basis of all training of new members, then and since.

A potential shortcoming of the current training is that there is not mandatory refresher training. It is my understanding that there is nothing preventing a DAP member from requesting or attending refresher training, as they are run periodically by the Department. However, one would probably have to ask the Department directly whether steps could be taken to increase the scope of refresher training.

6. In the 4th paragraph on page 3 of your submission, you state:

It is important to understand that a panel member/Councillor should not exceed or abuse powers set out in the statutes including the Local Government Planning Scheme.

□ Could you give an example(s) of a decision on a planning application which you believe would exceed or abuse power set out in a local government planning scheme?

As I outlined in my previous written submission, Hon David Malcolm QC made several specific comments when he was chair of the Town Planning Appeal Tribunal about the lawful use of discretion. The planning law reports and SAT judgments outline a range of examples of local governments going beyond their lawful power under their local planning scheme. Beyond that, it would be difficult to recall named specific examples, such as those relevant to the introduction of the DAP system, as that was a number of years ago.

However, what I can confidentially say is that in my decades of experience in exposure to planning approval matters, both in local government and as part of the Planning Commission, I have also witnessed firsthand many instances where Councils have made decisions potentially contrary to the lawful limits of their own scheme. This would often occur where Council acted contrary to the technical advice of the professional planning staff.

7. In the last sentence in the first paragraph on page 4 of your submission you state:

If a development is refused, the reasons for the refusal must be clearly stated.

□ Some submitters to this inquiry have expressed concern about DAPs not giving reasons for decisions approving applications when these go against the recommendation in the responsible authority report and, especially, the application does not comply with the deemed-to-comply provisions and the exercise of discretion results in a significant variation to the R code for the area. What is your view?

I believe there may be some difficulty in responding to what submitters have said without being given an opportunity to see the evidence, including the context upon which the statements were made.

That said, concerning reasons, yes, DAPs should be giving reasons for decisions when their decision is contrary to the recommendation set out in the recommendation report (RAR). This is a general planning-law principle and is also I believe reflected in our Making Good Planning *Decisions manual.*

Concerning not complying with the deemed-to-comply provisions of the R-Codes, I would avoid the term "not complying". That gives the impression that the decision is somehow unlawful. In reality, the R-Codes themselves give discretion to vary, either through the application of Design Principles or when the local government itself varies the R-Codes through a structure plan, local development plan or local planning policy.

□ The Committee notes that some local planning schemes state that where an application is refused, the decision making authority is to give reasons for its refusal, but not if it has been approved. Is it your understanding that this is common in local planning schemes and would it be fair to say that the practice regarding reasons given by DAPs merely reflects established practice by local governments? If so, do you believe this should change?

I broadly agree that where any decision is contrary to the recommendation of planning staff, sufficient reasons should be given. The reason for this is quite logical. If the decision-maker is simply following the recommendation as set out in the report, then the reasons are largely said to reflect the report. However, where the reasons are contrary to the recommendation of professional planning staff, then decision-makers should explain why they have come to a different conclusion.

I also agree this is arguably as much an issue of local government decision-making as DAP decision-making. To this end, I understand the Department, advising the Commission, is working to introduce new Local Planning Scheme Regulations. I believe this issue could be addressed through those new regulations, particularly as a new deemed provision.

8. In the 1st sentence in the 2nd paragraph on page 4 of your submission you state:

It is important that the approval body ensures that the decisions made can be defended on town planning principles and if not, then there is a high risk that on appeal, the decision of a Council or Development Assessment Panel may be overturned.

□ Please specify the type of appeal are you referring to – a hearing *de novo* before the State Administrative Tribunal which can only be initiated by the applicant or on an application for judicial review before the Supreme Court, open to anyone who has the required standing to do so, or both?

It could be both. I did primarily mean before SAT, 'standing in the shoes' of the original decision-maker.

However, acting in accordance with proper lawful town planning principles is also relevant in any potential application to the Supreme Court for judicial review. Arguably a planning decision-maker is bound under general principles of administrative law to only consider 'relevant considerations' and not consider 'irrelevant considerations'. Within a town planning context, relevant considerations are town planning principles, often pertaining to the type of matters set out in Schedule 7 of the Planning and Development Act.

9. With respect to your remarks in the 3rd paragraph on page 4 of your submission, if there is a question over whether a decision made in favour of the applicant, who does not wish to appeal to the State Administrative Tribunal, was based on sounded (sic) planning principles and can be defended on its merits, how can it be challenged if there is no third party right of appeal, either by the local government or any other interested party? Would this be restricted to a complaint made under Part 7 of the DAP Procedures Manual?

It is my understanding that it is a matter of Government policy that there are no third party appeal rights for planning decisions in WA. This is not a DAP-only matter – this relates to all planning decisions. Therefore, in some sense this question is better answered by the Minister.

However, the nub of the Committee's question seems to be how a planning decision that is not based on sound town planning principles can be challenged, if it is not appealed to SAT. The answer is by way of judicial review to the Supreme Court. As I explained in relation to the previous question, a decision that was not based on sound town planning principles would arguably be contrary to administrative law principles about relevant and irrelevant considerations.

10. With respect to your comments in the 4th paragraph on page 5 of your submission regarding a lack of consistency of approach in decision making by local governments:

□ Could you expand on this by giving some examples?

It would difficult for me to give exact contemporaneous examples, especially given the limited time afforded me for the preparation of this hearing. I largely draw this conclusion from my decades of day-to-day experience with local government and the Commission, dealing with thousands of different applications.

□ The Committee has received evidence that the vast majority (up to 95%) of decisions by DAPs have been consistent with the recommendation in the responsible authority report and that many of these could have (and would have, prior to the introduction of the DAP system) been made by local government planning officers under council delegation. What are your views on this, given your comments?

I believe there may be some difficulty in responding to what submitters have said without being given an opportunity to see the evidence, including the context upon which the statements were made.

That said, it is not entirely clear what the Committee's implication is in the question. The fact DAPs continue to follow the recommendation of professional planning staff is not at all a concern. The concern was never with the professional planning staff, because they remain an integral part of the process in the DAP system. The issue instead was the decision-making of Councils, who have now in some instances been replaced with the DAPs.

Furthermore, the question may overlook the importance of DAPs in setting new, more appropriate and more robust planning conditions. Even where DAP do follow the recommendation of professional planning staff, it is my understanding that they still bring their knowledge and experience to do significant work in amending planning conditions.

11. With respect to your comments in the 6th and 7th paragraphs on page 5 of your submission regarding the planning assessment processes of local governments:

□ Please identify the source of this information;

□ Please give examples of the poor practice to which you refer;

□Would you regard the issues you refer to as systemic in nature and, if so, why?

It would be difficult, within the limited time given me by this Committee in preparation for this hearing, to provide specific examples. The issues cited primarily comes from decades of experience as working intimately both within local government and as part of the Commission.

12. With respect to your comments in the last paragraph on page 5 and over on page 6 of your submission regarding planning law courses:

□ Which planning law courses are you referring to?

I am principally referring to planning law units run as part of town planning degrees. It is my understanding, from talking to my own staff (both as Director General and now as Chairman of the Commission) that town planning graduates receive an education

focusing on the Planning and Development Act as a whole. Whilst that is fine in of itself, it is my understanding that not much time is spent focusing on valid and invalid conditions, relevant and irrelevant conditions, or the proper utilisation of discretion.

As I explained in my written submission, in my own considerable personal experience with dealing with new planning graduates, there is now predominance towards a 'tick a box' mentality. I have often expressed this concern with our senior (and often older) professional town planners.

□ Do you believe the training received by DAP members is adequate? If so, why and if not, why not?

It is an immense improvement on what was occurring previously. I believe Councillors are also benefiting from being exposed to decision-making involving very experienced and qualified experts.

□ How would you ensure there is adequate information and training on assessment processes and the exercise of discretion for those making decisions on planning applications?

One practical suggestion would be to mandate refresher training somehow. However, as to the practical mechanics of that, this would probably best be addressed by the Department.

13. Please give a summary of the advice that was received from Eastern States jurisdictions, referred to on page 6 of your submission.

There are some difficulties with giving the level of detail the Committee probably now desires, given the amount of time that has now elapsed. The primary point to emphasise is that this State did not introduce DAPs in a vacuum. They were introduced as part of a whole-of-Australian-governments approach, in consultation with the Commonwealth and other states, as part of the Development Assessment Forum.

14. At a hearing on 4 May 2015, the Local Government Planners Association stated:

Mr MacRae: it seems to be clearly in regulations, is that the DAP has to make a decision based upon the situation in the scheme and a properly prepared local planning policy. But what is happening increasingly is that the DAP is taking a policy, which is a broad strategic policy such as "Directions 2031", and saying that this deals with everything to do with residential development, so people can basically find some words in that policy—you can find anything in that policy—to override a properly constituted local planning policy for, perhaps, a height restriction on Beaufort Street, which is clearly either in the City of Stirling's town planning scheme or in a properly constituted policy relating to that, but it is overridden because the DAP has said that we have got to have higher density because a state policy has indicated that. For some, it is semantics, but for a local government, that is quite a clear difference. It is not legitimate to use a broad strategic policy which even as you read it says that this only has effect by being interpreted and applied through amendments to town planning schemes and policies. But some of the DAPs are going further than that.

What is your view on this statement? Is it appropriate that consideration is given to Directions 2031 in that way?

With all respect to Mr MacRae, I disagree with that assessment. As a question of competing planning considerations, Directions 2031 is an important strategic document, much like State planning policies, which should be given due regard by decision-makers. However, those documents cannot override the provisions set out in local planning schemes, which have the status of law as subsidiary legislation. DAPs can only exercise their discretion 'standing in the shoes' of the local government under its own scheme. If the local government wants to limit discretion, then it is up to that local government to put in place an appropriate planning framework, through its own scheme provisions, to do that.

As for local planning policies specifically, they are only there to guide discretion. The weight they are to be given is determined from the well understood test from *Permanent Trustee Australia Ltd v City of Wanneroo* (1994) 11 SR(WA) 1, which is:

(a) whether it is based on sound town planning principles;

(b) whether it is a public, rather than a secret policy;

(c) whether it is a public policy conceived after considerable public discussion;

(d) the length of time that a policy has been in operation; and

(e) whether it has been continuously applied.

If there is some perceived conflict between a State planning policy or other policy of the Commission, clauses 2.3.1 and 10.2(c), (e) and (f) of the Model Scheme Text gives all these policies 'due regard' status. Therefore, if such a conflict arises, it is quite open for a decision-maker to give greater weight to the broad intent of the State policy over the narrow intent of the local policy.

Some might rightly expect that sort of application, given State planning policies go through a statutory process and are signed-off by the Governor. Similarly, strategic Commission policies are specifically empowered under section 14(b) of the Planning and Development Act.

In any event, the key point to again emphasise is that in any perceived competition between State and local policy, all policies are overridden to the extent of any inconsistency with a planning scheme. What this question underpins is that many local governments are failing to keep their own local planning schemes up-to-date. Instead, they are using local planning policies as a 'band aid' interim solution. Previously this was not as noticeable, but the DAP system has brought this problem into the spotlight.

15. What is your feedback on the view that, instead of DAPs being used for all planning applications within the monetary criteria set out in the Regulations, they should be used in a more targeted way, such as with respect to certain local governments who are underperforming or make decisions on applications for which the WAPC has withdrawn delegation from a certain local government?

When the DAP system was first raised as a potential idea within the whole-of-Australian-governments, this was one mooted idea. It is also true that instead of introducing a DAP system, the Commission could have simply withdrawn its own delegations to local governments (at least where a region planning exists, primarily in the Metropolitan area). There is therefore some irony in perceived local government criticism of the DAP system, when the Commission had the power (and important still *does* have the power) to address concerns about local government decision-making

in a very unilateral way. However, it is my recollection that this idea was not further progressed for the follow types of reasons:

- First, because we did not want to be so overtly punitive to existing local governments. It would be a serious embarrassment to those so stripped of their power, which would in turn have serious political ramifications for those particular local government Councillors. In light of local government amalgamation, one can see the power of local opposition when particular Councils are singled out for "special treatment". As such, it was deemed fairer to make the DAP system apply to all local governments.
- Second, it is arguable we addressed the nub of this issue anyway through the introduction of optional DAP applications. The general position was that some applications over a certain threshold are of sufficient significance that they should be mandatory applications. However, for the rest, there would be significant discretion by proponents whether to choose to go to the local government or the DAP. This in effect would allow proponents to "choose with their feet" those underperforming local governments, without the State or Commission so openly naming and shaming them openly.
- Third, if the Commission had altered its delegation arrangements, this would not streamline the approval process. Rather, all it would do is turn a significant number of applications into "dual approvals", where both the approval of the local government (under its local scheme) and the Commission (under a region scheme) are required. Contrary to popular perception, where there is a refusal under a local scheme and an approval under a region scheme (or *vice versa*), the Commission's decision under the region scheme does not prevail. Therefore, the DAP system would allow the introduction of a truly single decision-maker for applications that till now have been delayed through the need of a dual approval.

16. What is your view on the following comment, which appears in a paper by Dr Paul Maginn and Professor Neil Foley entitled "*From a centralized to a 'diffused centralised' planning system: planning reforms in Western Australia*":

The decision to set up DAPs is somewhat curious when one considers that WA already had pre-existing structures – the WAPC's Statutory Planning Committee and South West Region Planning Committee – that met the tests of being technical, consistent and reliable in their decision-making and, more fundamentally, strategic in their outlook. These committees could easily morph into DAPs by simply adding two local council representatives into proceedings either in person or via teleconference.

The use of Commission sub-committees as alternatives to DAPs still would not negate the issues outlined above, such as the problem of dual approvals. The sort of committee Dr Maginn and Professor Foley would, if the necessary changes were made, indeed be very similar to the current DAPs.

In both cases, DAPs are assisted by the same public servants found in the Department of Planning. We even have persons, such as Megan Bartle, who are members of both a DAP and a Commission committee (SPC).

However, if the suggestion then is that these committees would have been less controversial, then it suggests the opposition to DAPs is largely based on a name – "Development Assessment Panel" as opposed to a committee of the "Western Australian Planning Commission". I would not personally oppose morphing DAPs into the Commission, as potential committees, provided it is understood such a change would primarily be cosmetic in nature.

Third party appeals

17. Some submitters have stated that a right of appeal to the State Administrative Tribunal should be extended to persons other than the applicant aggrieved by the determination of an application by a DAP who have a special interest in the outcome. This is on the basis that, unlike before the Regulations were made, the representatives of the community no longer control the decision-making process (which provided some justification in restricting the right of review to an applicant aggrieved by the local government).

- **Taking into account this point of view, what are your views on interested parties having a right of appeal to the State Administrative Tribunal against decisions of DAPs, including local governments and members of the community?**

I note it is Government policy that there are no third party appeal rights in Western Australia. This is not a DAP-specific issue – it relates to all planning approvals, if not all approvals generally.

That said, if one were to speculate, one might ask whether there should be third party appeal rights for all decisions, whether by local government or the Commission. However, I suspect many industry stakeholders would strongly oppose that idea, for the prospect of delaying and adding significant additional cost to applications.

Role of local Councillors

18. Do you believe the role of elected councillors on DAPs has been clearly articulated (given they are required to make their own independent decision on the planning merits of an application as well as be representatives of the local government)?

Yes. In many respects the role of Councillors on DAPs is little different from their current role on Council. All that has changed is that the number of Councillors has lessened, and the Councillors are joined by some experts. It is the new DAP expert members who would potentially be least familiar with these principles.

If the implication in the Committee's question is that Councillors currently do not have to make their own independent decision on the planning merits, but must instead somehow simply act as conduits of their constituents' views, then this is factually and legally incorrect. I believe my written submission went into some detail explaining how Councillors, already currently, must exercise independent judgment in a "quasi-judicial manner" when making a planning decision according to the relevant considerations outline in their own local planning scheme.

19. Do you believe there is any inconsistency between what is stated in Regulation 25 and clause 2.1.2 of the DAP Code of Conduct (Regulation 25 referring to local government DAP members being 'representatives of the relevant local government' and clause 2.1.2 of the DAP Code of Conduct stating a local government member 'must exercise independent judgment') in a scenario where a DAP may decide not to follow the recommendation in the RAR as well as the views of the local government council?

No. As my written submission went into with some detail, being a "representative" implicitly means still exercising "independent judgment", in accordance with the law, taking all relevant considerations into account; acting in a quasi-judicial manner.

DAP decisions in secret

20. Concerns have been expressed about State Administrative Tribunal processes being undertaken on a confidential basis and decision making being undertaken by DAPs in closed meetings.

□ Would the same procedure apply to a local government consideration of a development application subsequent to a State Administrative Tribunal mediation – would that council meeting also be closed to the public?

My understanding is that most section 31 reconsiderations by local governments, if not by the Commission, occur in private. I believe local governments rationalise this on the basis that section 31 reconsiderations are continuations of the SAT mediation process, which has to be confidential.

Moreover, I understand the Department has issued a DAP Practice Note addressing these concerns, so that now all section 31 reconsiderations are now dealt with in public.

I do, however, note the DAPs did for a time receive much criticism for doing what was already a long-established local government practice. Some of the criticism ironically came from local governments, or rather through their legal representatives.

□ Do you believe DAP meetings which discuss the outcomes of State Administrative Tribunal mediations should be open to the public?

I believe that really is a question for those who run SAT, being the CEO of the Tribunal, or the Director General of the Department of the Attorney General. The fact is the SAT Act requires mediation to be confidential and in private. That is a consequence beyond the DAP system's control or ability to influence.

As to whether that current legal reality should continue, I believe that is principally a question of Government policy. That said, there is a significant concern that if matters discussed in private mediation were disclosed to the public in an open meeting, then it would undermine the confidence of the SAT process. It certainly could result in fewer matters before the Tribunal being resolved through mediation.

Moreover, this really is not a DAP-specific matter. The same question could be asked about planning decisions generally, including decisions by local governments.

DAP members representing developers

21. The Committee has received evidence from some submitters that DAP members have represented developers in applications before DAPs on which they sit (having been excused on that occasion from sitting on the DAP due to having a conflict of interest). It has been argued this creates negative community perceptions and there should be a blanket ban on them doing so in the area of the DAP they are appointed to. What is your view on this generally as well as the recommendation?

I believe there may be some difficulty in responding to what submitters have said without being given an opportunity to see the evidence, including the context upon which the statements were made.

That said, I do appreciate the issue raised here. I do not disagree that steps should be taken to ensure that conflicts, not just real but perceived conflicts, are probably managed. However, I do note that it is primarily the responsibility for the current Director General of the Department, who has the responsibility of creating, amending and enforcing the DAP Code of Conduct and Standing Orders. What the Committee suggests is certainly worth further consideration.

<u>Valuing of applications to achieve DAP threshold</u>

22. Some submitters have alleged there may have been instances of applicants providing an estimate of the value of their application in order to achieve a DAP threshold and suggesting that all estimates should be subject to assessment by the relevant local government planning office before the application can be decided upon by a DAP. The validity of a DAP application has also been questioned should it later be determined that the value was actually below the minimum opt-in threshold. What are your views?

It seems this question might be based on an incorrect assumption. It is my understanding that all DAP application estimates are *already* subject to an assessment by the relevant local government before the application is decided upon by a DAP. It is my understanding it is the local government who is the point of lodgement for the DAP application, and who determines what appropriate fee (both the DAP fee and the local government's own fee) must be paid – based on the estimated cost of development.

The problem with attempting to call an application invalid later on in the process is that the local government has already accepted that application, already accepted the fee paid to them, and forwarded the application to the DAP Secretariat. I believe it is for this reason that the recent amendments to the DAP Regulations, including the new initial 'stop the clock' under regulation 11A, were introduced to give local governments a bit more time in this initial period.

23. Conversely, the Committee has received evidence that some applicants have deliberately 'staged' the development process to avoid going to a DAP, whereby each stage is subject to a separate application and individually assessed by the local government, thereby avoiding the mandatory threshold. What is your view on this? Are there any criteria that define a 'development application'?

That sort of behaviour is always going to be difficult to police. However, it is again principally local governments who are responsible for such matters, given they are the point of contact for the lodgement of all DAP applications. Nonetheless, I believe recent amendments to the DAP Regulations, widening the opt-in thresholds to give proponents more choice, should go some way to addressing that issue.

Exercise of discretionary powers

24. Concerns have been expressed by some submitters about the exercise of discretionary powers by DAPs, which have been described as unfettered and 'without justification or scrutiny'. A recommendation has been made that any exercise of discretion be limited to variations of no greater than one R-Code above that of the site in question and that the DAP give reasons for its decision. What is your view on this issue generally and these recommendations?

I believe there may be some difficulty in responding to what submitters have said without being given an opportunity to see the evidence, including the context upon which the statements were made.

However, I would strongly disagree with the proposition that DAPs have "unfettered" discretion and act 'without justification or scrutiny'. My written submission went into some explicit detail how all decision-makers, including local government Councillors as well as DAPs, must exercise discretion lawfully, in a quasi-judicial manner, constrained by the "fettering" of the law under the relevant local planning scheme.

Moreover, far from 'without justification or scrutiny' DAPs decisions are under intense scrutiny. The level of public and media attention is proof of that.

As to attempts to constrain DAP discretion in a way local government Councils are not, that idea is again premised on an incorrect understanding. The point is both Councils and DAPs must always exercise their discretion in a "fettered" manner under the law. To suggest DAPs must somehow have additional fettering might suggest local governments somehow can act contrary to the law.

If local governments wish to confine the discretion of DAPs, then they need to look at their own planning framework. I believe that many, if not most, local governments have not reviewed, updated and consolidated their own schemes as required under the Planning and Development Act. Therefore, whilst there might be a perception that DAPs are exercising discretion in a particular unforeseen way, local governments themselves are somewhat to blame if they have not taken sufficient steps to have a sufficiently robust scheme that would fetter the DAP's decision.

In other words, far from being a criticism of the DAP system, the perceived application of DAPs has actually proved its worth. In particular, it has highlighted areas where local governments have failed to have adequately robust planning frameworks. If local governments began acting more strategically, focusing on their system as a whole, than many of the perceived issues with DAP decisions would fall away.

25. In circumstances where a DAP allows a significant variation to a planning scheme requirement which results in the relevant site being treated as a different zone to that laid out by the local government, would it not be more appropriate for the local government to propose rezoning the site first? What are your views?

To be honest and with respect to the Committee, I do not entirely understand the question. It is not possible for a decision-maker to simply treat land as a different zone to which it is classified at law in a planning scheme, which has the status of law.

For example, every planning scheme will have a zoning table, which will set out if a particular use is "P" permitted, "D" discretion, "AA" discretion with advertising, or "X" prohibited. If the use is zoned P or X there is no discretion as to use – full stop.

In some rare occasions the underlying zoning may not be clear or open to a different sort of planning system. For example, the cities of Perth and Melville use precincts rather than zones. Structure plans are often technically "development zones" and the indicative zoning is set out in the plan, which might allow for some variation. There are also special use zones, which might allow for some variation.

There can however be disputes that commonly arise as to whether a particular development is really a certain proposed use or another use, or even an unlisted use. However, those scenarios still are not a matter of 'the relevant site being treated as a different zone'.

Finally, the Committee might be referring to variation of site and development standards connected with a particular zone. However again, that would be different from the idea of 'the relevant site being treated as a different zone'.

Thus, without being given further information, it is difficult to anticipate what the Committee is specifically referring to. I am happy to take the question on notice if further information can be provided.

26. Regarding the recent modification to the Model Scheme Text to require the inclusion by local governments of a discretionary clause in their local planning schemes, is it open for local governments to modify that clause, say, to limit the scope of that discretion? If so, what is the extent to which modifications can be made?

With respect to the Committee, I do not entirely understand the question. The Model Scheme Text is an appendix attached to the *Town Planning Regulations 1967*. The last time the Town Planning Regulations were amended was in 2013, which was simply a minor consequential amendment to regulation 5, to do with a naming convention about licensees under new *Water Services Act 2012*. The next most recent amendment before that was in 2004, which made new references to the then newly established State Administrative Tribunal.

In any event, clause 5.5 of the existing Model Scheme Text already provides a discretionary clause in local government schemes:

> ***5.5. Variations to site and development standards and requirements***
>
> *5.5.1. Except for development in respect of which the Residential Planning Codes apply, if a development is the subject of an application for planning approval and does not comply with a standard or requirement prescribed under the Scheme, the local government may, despite the non-compliance, approve the application unconditionally or subject to such conditions as the local government thinks fit…*

<u>Delays in the process</u>

27. Concerns have been expressed that DAPs have added delays to the planning system, with one reason being given as the lack of information given by the applicant and a breakdown in communication between the applicant and decision maker (whereas the local government system provides both parties with an opportunity to engage prior to the application being made).

□ Are you aware of any applications being made to the State Administrative Tribunal for a review by an applicant due to there having been a deemed refusal by a DAP because it has not made a determination within the timelines required by the relevant planning scheme?

As Chairman of the Commission, I am not intimately involved in the day-to-day operation of the DAP system. It is also some time now since I was involved in the running of the DAP system as the previous Director General of the Department of Planning.

That said, I do recall and have been informed that DAP decisions have had to be deferred in circumstances where there has been the need for further information. I do not deny the possibility of some proponents also exercising their deemed refusal triggers by making an application to SAT. The Committee would have to ask the Department for exact figures.

However, from practical experience I would doubt too many proponents would go to SAT where the DAP had not yet made a decision, even where the deemed refusal period had been reached. This is because in practice, the Tribunal simply refers the matter back to the original decision-maker as part of a section 31 reconsideration. That is the strong current practice of SAT, which emphasises mediated outcomes.

This is part of the reason why DAPs were introduced. Even or especially in local government, a Council can take months to make a decision and the proponent will know, in practical terms, that it is a waste of time making an application to SAT.

□ How would you recommend any issue of delay be addressed?

Probably the only way to address this matter is through an alteration of the SAT process. It would require taking steps to get a more expedited outcome in that jurisdiction.

In fact, DAPs are so popular as an alternative to SAT that I am informed there have been new applications to the DAP where there was a previous refusal by Council on a near-identical application. Thus, DAPs are seen by some proponents not a cancelling of local Council, because the proponent still in the first instance wants the application determined by Council. Rather, the DAP is seen as a better form of review than the current SAT process.

<u>WAPC representation on DAPs</u>

28. Do you feel it is appropriate there is no representation of WAPC on DAPs, despite DAPs making some decisions that were previously decided upon by the WAPC?

The DAP system was deliberately designed this way. Part of the rationale was to emphasise the complete independence of the DAPs from original decision-makers, even from the Commission.

In any event, in some instances, Commission committee members (e.g. Megan Bartle) are also DAP members. I otherwise do not have strong feelings, and would not oppose a measure to include Commission representation on the DAPs. The greater practical issue would be who to include on the DAPs, as apart from myself, many of the Commission members are *ex officio* heads of other Government

departments and agencies. If instead one is talking about the Commission's own committee members, then again, there is already nothing preventing such members from also being appointed by the Minister to a DAP. Therefore, the idea might not be practically determinative either way, given in reality the Minister appoints three specialists to the DAPs, where these could be current Commission members.

Amendment of DAP Regulations 2015

29. Various amendments have been made to the DAP Regulations, which took effect on 1 May 2015. Some of the changes made are as follows:

□ A lowering of the opt in threshold to $2m for all DAPS;

□ An increase in the mandatory threshold from $15m to $20m for the City of Perth DAP and from $7m to $10m for all other DAPs;

□ Disbanding of the Short-List Working Group (which was established to submit to the Minister for Planning short-lists of persons recommended for appointment as specialist members of DAPs);

□ The introduction of a 'stop the clock' mechanism whereby the time period for the submission of the RAR to the DAP does not include the time between the applicant being given a notice to provide specified information or documents;

□ A quorum being any 3 DAP members including the presiding member; and

□ the regulations prevail over any planning instrument to extent of any inconsistency.

The amendment regulations can be accessed on the website of the Government Gazette.

What are your views on the amendments? For instance:

□ Do you believe that it is appropriate that the 'stop the clock' mechanism be available to the local government for a maximum of 7 days from the receipt of the DAP application (including in circumstances where it may become apparent after 7 days that further information is required from the applicant)?

This provision was inserted, I believe and am informed, to assist local governments. I would certainly support the measure, given local governments otherwise are taken to have accepted the application, and with the deemed refusal 'clock' beginning, at the moment of acceptance at the local government front counter, when the proponent pays the relevant fee. Unfortunately with no disrespect to front counter staff at local governments, many may be unable to determine whether the application is capable of being accepted for assessment at that initial stage.

I believe the new regulation now gives the local government some extra time to determine whether the application is capable of being assessable. The alternative is the previous system, with the 'clock' starting on the day of initial lodgement.

□ What if relevant information (such as amended plans) are submitted to the local government by an applicant very close to the deadline for submitting the RAR to the DAP Secretariat? In such circumstances, would it be reasonable for the consent of the applicant to be required, as provided by Regulation 12(4) before the Presiding Member can give the local government an extension of time to submit the RAR (given the 'stop the clock' mechanism is no longer available)?

I appreciate the difficulties with this sort of issue. However, there would be little point in allowing the Presiding Member from unilaterally extending the time for the RAR

under regulation 12(4) if the underlying 'clock' for the deemed refusal period was not also extended.

As to whether a Presiding Member should be able to extend the deemed refusal trigger without a proponent's consent, I think that might be contrary to the whole point of a deemed refusal period. As previously stated, a deemed refusal period is only a trigger and does not otherwise prevent a decision-maker from proceeding to still make a decision. In practice, most proponents rarely utilise it because SAT usually simply refers the matter back to the original decision-maker, so the application for review can be viewed by some as longer than had they simply waited for the original decision-makers decision in the first place.

□ **Do you believe the decision to change the quorum requirements reflects the following:**

The involvement of independent experts will also help to strike an appropriate balance between local representation and professional advice in decision making by ensuring that decisions made by the panel are based on the planning merits of an application.

If the inference is that there may be DAP decisions without any local government DAP members present, then that is indeed a possibility. However, the reality is more likely the opposite, with DAP specialist members not being able to attend due to a conflict of interest. There have been a few instances to my knowledge where there had to be an urgent Ministerial appointment because both the Presiding Member and Deputy Presiding member were conflicted out from attending.

Moreover, this change is necessary because the previous system did not account for the possibility of local government DAP members being completely conflicted out. This has also nearly happened several times, including in one notable case that resulted in the Supreme Court matter of *Aloi v Bertola* [No 2] [2013] WASC.

With respect to local government involvement, the reality is each local government is permitted to submit four names to the Minister for appointment as members and alternative members. The chances of all four being conflicted, sick or other unavailable to attend is highly unlikely.

My understanding is this provision is largely administrative in purpose. In particular, it is to save the DAP Secretariat much grief, when it has to make several last-minute appointments where a DAP member could or should have known they would be unable to attend.